(14)

FILED
AUG 8 1941
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1941.

No. 213.

GEORGE PASCONE, PETITIONER,

v.

COMMONWEALTH OF MASSACHUSETTS.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

ROBERT T. BUSHNELL,
Attorney General,
FRANK G. VOLPE,
Assistant Attorney General.

JACOB LEWITON,
Assistant Attorney General,
Of Counsel.

ADDISON C. GETCHELL & SON, LAW PRINTERS, BOSTON.

INDEX.

	Page
Statement of the Case	1
The Issue	3
Summary of Argument	4
Argument	6
I. The enactment of chapter 584 of the 1907 Acts and Resolves of Massachusetts, regulating the sale of merchandise on the streets of the City of Boston, was a proper exercise of the police power of the Commonwealth	6
II. The application of the statute to this petitioner is not rendered unconstitutional merely because the commodity which he was selling on the streets of Boston was a pamphlet advocating certain religious doctrines or theories	10
Conclusion	12
Appendix	13

CITATIONS.

Cases:

Cantwell v. Connecticut, 310 U.S. 296	10, 11, 12
Commonwealth v. Ellis, 158 Mass. 555	7, 9
Commonwealth v. Fox, 218 Mass. 498	7, 9
Commonwealth v. Pascone (Mass.), April 5, 1941 (Mass. Advance Sheets (1941) 713; 33 N.E. (2d) 522)	7, 9
Cox v. New Hampshire, March 31, 1941 (61 Sup. Ct. Rep. 762)	6, 7, 8, 10
Hague v. Committee for Industrial Organization, 307 U.S. 496	6, 8
Lovell v. Griffin, 303 U.S. 444	11

Page

Manchester v. Leiby, 117 F. (2d) 661; cert. denied, April 7, 1941 (61 Sup. Ct. Rep. 838) 7, 10
Minersville School District v. Gobitis, 310 U.S. 586 10
Reynolds v. United States, 98 U.S. 145 10
Schneider v. State, 308 U.S. 147 6, 7, 11

Statutes:

Acts and Resolves of Massachusetts of 1907, chapter 584, as amended by Acts and Resolves of 1909, chapter 329 1, 5, 6

Supreme Court of the United States.

OCTOBER TERM, 1941.

No. 213.

GEORGE PASCONE, PETITIONER,
v.
COMMONWEALTH OF MASSACHUSETTS.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Statement of the Case.

The petitioner was prosecuted and found guilty upon a complaint charging that he "did use and occupy a part of a certain public street" of the City of Boston "for the purchase, sale, storage and display, in said part of said street, of certain merchandise, to wit books and pamphlets," in violation of chapter 584 of the 1907 Acts and Resolves of Massachusetts, as amended (see statute set forth in Appendix, pages 13 to 17, *infra*).

In substance the statute makes it a punishable offense, with stated exceptions not applicable to the petitioner, for a person to use or occupy a public street in the City of Boston for the purchase, sale, storage or display of merchandise or other articles without a license obtained pursuant to other provisions of the said statute (§ 10). An

applicant for such a license is required to apply therefor to the Board of Street Commissioners, describing the location which he desires to occupy, the movable structures he proposes to use and the kinds of merchandise which he wishes to store and sell (§§ 1, 2). He must secure the written consent of the owner of the premises in front of which he desires to carry on business and of the tenants of the ground floor of such premises (§ 2). The application is then referred by the Board of Street Commissioners to the Police Commissioner, who is required to examine the location for which the license is sought "with particular reference to the effect of its use as desired upon the free passage of vehicles and of foot passengers and upon the maintenance of public order" (§ 3). The Police Commissioner may approve or disapprove the application, or may make his approval conditional upon amendments made in the application as affecting the location, the area, or the kinds of merchandise to be stored and sold thereon (§ 3). The license may be for a limited period of time or any period not exceeding twelve months, and it may be suspended or revoked for reasons which the Board of Street Commissioners shall deem sufficient (§ 5). A fee of not less than five dollars nor more than one hundred dollars is to be charged for each license, according to the Board of Street Commissioners' estimate of the value of the privilege granted. An additional charge may be made as rent whenever the licensee is not the principal tenant on the ground floor of the premises in which the location is granted (§ 6). The requirements and prohibitions of the statute are specifically made inapplicable to certain designated market districts, including the Faneuil Hall market (§ 8). The Police Commissioner is authorized to designate certain streets, parts of streets or sections of the city wherein it shall be lawful on the days and within the hours specified by the Commissioner, and under general rules made by him, for a hawker or peddler to stop or stand for

the purpose of selling merchandise without a license provided for in this statute (§ 9).

It appeared in evidence that the petitioner, without having applied for or obtained a license from the Board of Street Commissioners under the provisions of the aforementioned statute (R. p. 1), stood on the sidewalk near the corner of Washington Street and Court Street, Boston, Massachusetts, on May 18, 1940, at about 11.30 a.m., carrying a sack of literature in the form of pamphlets entitled "Consolation" (R. p. 2) slung over his shoulder (R. p. 1) and carrying a placard bearing the words "Consolation Dares to Print the Truth Exposing Hypocritical Rackets 5c per Copy" (R. p. 2); that in the presence of a police officer the petitioner sold one of the said pamphlets to a passerby for five cents (R. p. 1); and that, when questioned by the officer, the petitioner said that he did not have a license to sell the said pamphlets and that he did not need one (R. p. 1).

The petitioner testified that he is a member of Jehovah's Witnesses (R. p. 1); that he is an ordained minister of that religious group (R. p. 2); that he was ordained by God and that his occupation on this earth is that of hod carrier (R. p. 2).

The petitioner contended that he was distributing the said pamphlets for the purpose of promulgating the religious beliefs of Jehovah's Witnesses (R. p. 2).

The Issue.

The issue sought to be presented by the petitioner in this case is whether the Supreme Judicial Court of Massachusetts was in error in holding that the said statute was applicable to, and could properly be enforced against, the petitioner in connection with his offers to sell and sales of pamphlets on the streets of the City of Boston.

Summary of Argument.

The statute in question is designed to regulate the use of the streets of the City of Boston by persons who would use the streets for their own benefit in displaying and selling merchandise, whatever its character. The statute as construed by the Supreme Judicial Court of Massachusetts (R. p. 16; opinion rendered April 5, 1941, reported in Mass. Advance Sheets (1941) 713) does not in any way prevent or interfere with the free dissemination of information or distribution of pamphlets on the streets of Boston.

The regulations contemplated by the statute under consideration have two principal aspects. One involves the protection of the interests of the travelling public in their use of the streets and sidewalks. The other aspect involves the protection of owners and occupants of premises abutting on the streets of Boston from unfair competition or other unjustifiable interference with their use and enjoyment of their property, said unfair competition or interference arising out of the commercial use of the streets and sidewalks by persons not paying taxes on, or rent for, abutting property.

It is, of course, well settled that appropriate governmental agencies are under obligation to assure the safety and convenience of the people in the use of public highways by means of reasonable regulations. Such regulations may properly deal, as does the statute here under consideration, with the effect of a proposed commercial use "upon the free passage of vehicles and of foot passengers and upon the maintenance of public order" (§ 3). It is beyond dispute, also, that the police power furnishes ample basis for the reasonable regulation of commercial solicitation or canvassing, and commercial peddling or other selling of merchandise. Consequently, the validity of the statute here under consideration must be sustained if, as the respondent contends, it prescribes reasonable regulations governing sales of merchandise on the public highways.

The statute under consideration is of general application, applying to sales of all types of "merchandise." This term obviously includes pamphlets of the type displayed and sold by the petitioner. The fact that in this instance the pamphlets are alleged by the petitioner to deal with religious subjects and to be designed to promulgate certain religious theories or doctrines does not remove them from the permissible scope of operation of the general statute. Nor is the petitioner himself excluded from the operation of the law, even if it be a fact, as he claims in substance, that his religious beliefs require or authorize him to sell these pamphlets on the streets of Boston without applying for or obtaining a license. While the petitioner is entitled under the Constitution of the United States to absolute freedom with respect to his religious beliefs, his conduct remains subject to reasonable regulation for the protection of society.

The petitioner admittedly set himself up to sell pamphlets at a busy intersection of streets in the City of Boston. In these circumstances the requirement that he procure a license under the provisions of chapter 584 of the Acts and Resolves of Massachusetts of 1907, as amended, did not unreasonably interfere with the petitioner's rights under the Fourteenth Amendment to the Constitution of the United States.

Argument.

I. THE ENACTMENT OF CHAPTER 584 OF THE 1907 ACTS AND RESOLVES OF MASSACHUSETTS, REGULATING THE SALE OF MERCHANDISE ON THE STREETS OF THE CITY OF BOSTON, WAS A PROPER EXERCISE OF THE POLICE POWER OF THE COMMONWEALTH.

This Honorable Court has frequently recognized the duty of local governmental agencies to regulate the use of public highways.

> *Schneider* v. *State*, 308 U.S. 147, 160.
> *Cox* v. *New Hampshire*, March 31, 1941 (61 Sup. Ct. Rep. 762, 765).
> *Hague* v. *Committee for Industrial Organization*, 307 U.S. 496, 516.

In the *Schneider* case this Court said:

> "Municipal authorities, as trustees for the public, have the duty to keep their communities' streets open and available for movement of people and property, the primary purpose to which the streets are dedicated. So long as legislation to this end does not abridge the constitutional liberty of one rightfully upon the street to impart information through speech or the distribution of literature, it may lawfully regulate the conduct of those using the streets" (308 U.S. 147, 160).

It is to be noted at the outset that the Massachusetts statute does not prevent or interfere with the imparting of knowledge through speech or the free dissemination of literature upon the streets of the City of Boston. "It is not directed against the dissemination of information or the distribution of printed matter by persons simply going about from place to place in the streets. It is directed to

the regulation of persons who seek to establish themselves for business purposes in some one place in the street for an appreciable period of time, thus appropriating to their own use and profit a part of the space dedicated and prepared at public expense for purposes of public travel."

Commonwealth v. *Pascone* (Sup. Jud. Ct. of Mass., opinion rendered April 5, 1941, reported in 1941 Mass. Advance Sheets, 713, 717; 33 N.E. (2d) 522).

Cf. *Manchester* v. *Leiby*, 117 F. (2d) 661, 664; cert. den. April 7, 1941 (61 Sup. Ct. Rep. 838).

The validity of this statute, which regulates the acts of persons seeking to use the public highways for commercial purposes, is not to be determined by the standards applied in cases involving limitations upon the non-commercial dissemination of ideas or distribution of literature. The power of a State to regulate such commercial use of the streets is considerably broader than the power to regulate their use for non-commercial dissemination of information.

Schneider v. *State*, 308 U.S. 147, 165.

Where, as is the case in Boston, the streets are narrow and congested, it is particularly important that their use be made subject to reasonable regulation.

Cox v. *New Hampshire*, March 31, 1941 (61 Sup. Ct. Rep. 762).
Schneider v. *State*, 308 U.S. 147, 160.
Commonwealth v. *Ellis*, 158 Mass. 555, 556.
Commonwealth v. *Fox*, 218 Mass. 498, 500.

In the case of *Commonwealth* v. *Ellis*, *supra*, the Massachusetts court considered the validity of a municipal ordinance providing that no person should sell merchandise in

the streets of Boston without a permit from the superintendent of streets. The validity of the ordinance was upheld in an opinion by Mr. Justice Holmes, in which the following language appears:

> "Any one who has observed the obstruction to travel and the general inconvenience which are caused by a stationary object in our crowded and narrow streets, would be slow to declare unreasonable a prohibition intended to prevent that inconvenience. We are of opinion, both on principle and on authority, that for this purpose the city council lawfully may forbid public selling in the streets. . . . This being so, the ordinance is none the worse for the exception in case of a permit from the superintendent of streets" (158 Mass. 555, 556).

A citizen has no absolute right to use the public streets, even for the non-commercial dissemination of his views. His privileges and rights in this regard must be exercised in subordination to the general advantage, comfort and convenience of the community.

> *Hague* v. *Committee for Industrial Organization,* 307 U.S. 496, 516.
> *Cox* v. *New Hampshire,* Mareh 31, 1941 (61 Sup. Ct. Rep. 762, 765).

Speaking for a unanimous court, Chief Justice Hughes said, in the *Cox* case, *supra:*

> "The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order

upon which they ultimately depend. The control of travel on the streets of cities is the most familiar illustration of this recognition of social need. Where a restriction of the use of highways in that relation is designed to promote the public convenience in the interest of all, it cannot be disregarded by the attempted exercise of some civil right which in other circumstances would be entitled to protection."

In so far as the Massachusetts Legislature sought to protect the rights of abutting property owners and occupants from unjustifiable interference by other persons seeking to appropriate adjoining portions of the streets or sidewalks to their own use and profit, the statutory provisions are clearly reasonable. Since the amounts of taxes payable by property owners and the rentals payable by their tenants are directly affected by the location of the property and by the nature and extent of traffic on the streets abutting it, one cannot fairly quarrel with a legislative purpose to prevent a stranger to the property from selling competing wares rent-free in front of such property or from otherwise interfering with traffic to, from or in front of such property for his own benefit and profit. There is no requirement, either in the Constitution of the United States or in any sound theory of justice, that any person shall have an absolute right to appropriate to the use of his own private business a part of the street or sidewalk dedicated and prepared at public expense for general public use.

See *Commonwealth* v. *Pascone* (Mass.), April 5, 1941 (1941 Mass. Advance Sheets, 713; 33 N.E. (2d) 522).
Commonwealth v. *Fox*, 218 Mass. 498, 500.
Commonwealth v. *Ellis*, 158 Mass. 555, 556.

II. THE APPLICATION OF THE STATUTE TO THIS PETITIONER IS NOT RENDERED UNCONSTITUTIONAL MERELY BECAUSE THE COMMODITY WHICH HE WAS SELLING ON THE STREETS OF BOSTON WAS A PAMPHLET ADVOCATING CERTAIN RELIGIOUS DOCTRINES OR THEORIES.

While the First and Fourteenth Amendments to the Constitution of the United States guarantee an absolute right of freedom of religious beliefs, there is no such absolute right of freedom to act in accordance with one's religious beliefs. The pamphlets displayed and sold by the petitioner on the streets of Boston were a form of "merchandise", whatever their contents. The petitioner's actions in connection therewith brought him clearly within the scope of the general prohibitions of the statute, which was not rendered inapplicable to his conduct by reason of his religious beliefs.

This underlying principle has often been recognized by this Honorable Court.

Cox v. *New Hampshire*, March 31, 1941 (61 Sup. Ct. Rep. 762, 765).

Cantwell v. *Connecticut*, 310 U.S. 296, 303.

Minersville School District v. *Gobitis*, 310 U.S. 586, 594.

Reynolds v. *United States*, 98 U.S. 145, 166.

See also *Manchester* v. *Leiby*, 117 F. (2d) 661, 666; cert. denied, April 7, 1941 (61 Sup. Ct. Rep. 838).

The conditions imposed by the Massachusetts statute upon the sale of pamphlets by the petitioner did not in the slightest degree interfere with his right to freedom of religious belief or his right to a free dissemination of his beliefs. The only effect of the statute was to regulate his

attempted commercial use of the public streets of the City of Boston, and this effect did not infringe upon his constitutional rights.

In his brief in support of the petition for certiorari, the petitioner relies chiefly upon the following cases, all of which are readily distinguishable from the case at bar:

Lovell v. *Griffin*, 303 U.S. 444.
Schneider v. *State*, 308 U.S. 147.
Cantwell v. *Connecticut*, 310 U.S. 296.

In the first place, none of the foregoing cases involved statutes or ordinances the operation of which was limited to the regulation of commercial uses of public highways, as is the Massachusetts statute here under consideration.

In *Lovell* v. *Griffin*, *supra*, this Court held unconstitutional a municipal ordinance which prohibited the distribution of literature of any kind, at any time, at any place and in any manner without a permit from the City Manager. This was held to violate the guaranty of freedom of the press. No such prohibitions are contained in the Massachusetts statute, which leaves wholly unregulated all forms and methods of distribution of literature, except distribution involved in sales in the streets of the City of Boston.

In *Schneider* v. *State*, *supra*, the Irvington ordinance forbade canvassing, soliciting, the distribution of circulars or the communication of any views whatever, from door to door, without a permit from the chief of police, who was given extremely broad discretionary powers in determining what literature and ideas might be distributed or disseminated and by what persons they might be distributed or disseminated. The Massachusetts statute contains no such limitations upon the dissemination of ideas or the distribution of literature.

The *Cantwell* case, *supra*, involved a statute forbidding the solicitation of money for religious purposes without the approval of a specified public official. It was applicable to solicitation in homes and in other private places, as well as in public places. This Honorable Court held that the right to make such solicitations could not lawfully be conditioned "upon a license, the grant of which rests in the exercise of a determination by state authority as to what is a religious cause . . ." (310 U.S. 296, 307). The Massachusetts statute here challenged imposes no restriction whatever upon the solicitation of funds for religious purposes, or even upon the sale of religious pamphlets except where such sales are made in the streets of the City of Boston.

Conclusion.

The respondent respectfully submits that the judgment of the Massachusetts court which is challenged by the petitioner was correct, in that the statute which the petitioner was found to have violated imposes reasonable regulations concerning the use of the streets of the City of Boston for commercial purposes, and does not impair or infringe upon any right of the petitioner under the Fourteenth Amendment to the Constitution of the United States. The respondent respectfully urges that the petition for certiorari be denied.

Respectfully submitted,

ROBERT T. BUSHNELL,
Attorney General,

FRANK G. VOLPE,
Assistant Attorney General.

Of Counsel:

JACOB LEWITON,
Assistant Attorney General.